

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ROBBIE LEE HALL,

Plaintiff,

v.

PAUL HUGHES; SCOTT MacLOUD;  
GARY RIESEN, in his capacity as  
the Chelan County Prosecuting  
Attorney; THE CITY OF  
WENATCHEE; CHELAN COUNTY; and  
THE BURLINGTON NORTHERN & SANTE  
FE RAILROAD CO.,

Defendants.

NO. CV-03-0040-EFS

**ORDER GRANTING DEFENDANTS'  
MOTIONS FOR SUMMARY  
JUDGMENT, DENYING  
PLAINTIFF'S MOTION AS MOOT,  
ENTERING JUDGMENT IN  
DEFENDANTS' FAVOR, AND  
CLOSING FILE**

Before the Court are Defendants City of Wenatchee and Officer Paul Hughes' Motion for Summary Judgment, (Ct. Rec. 34), Defendants BNSF Railway Company (BNSF) and Scott MacLeod's Motion for Summary Judgment, (Ct. Rec. 37), and Plaintiff's Motion to Exclude Testimony of Expert Witness, (Ct. Rec. 46). Defendants' Motions for Summary Judgment seek dismissal of the case on the grounds that the officers are entitled to qualified immunity protection under 42 U.S.C. § 1983 because there was probable cause to arrest Mr. Hall for trespass in the second degree. After reviewing the submitted material and applicable case and statutory law, the Court is fully informed, grants Defendants' motions and denies as moot Plaintiff's motion.

1 **A. Procedural Background**

2 The Defendants' motions were both filed on April 1, 2005. Under  
3 Eastern District of Washington Local Rule 7.1(c), a party has eleven  
4 calendar days to file a response. However, this Court extends the  
5 response deadline for dispositive motions, such as the Defendants'  
6 Motions for Summary Judgment, to twenty-one days. The Local Rules warn  
7 parties that failure to file a timely memorandum may be considered by the  
8 Court as consent to entry of an adverse order.<sup>1</sup> LOCAL RULES 7.1(h)(5) &  
9 (h)(b). Plaintiff filed an opposition in the form of an Affidavit of  
10 Ryan Edgley, (Ct. Rec. 57), and Response to Defendants' Statements of  
11 Material Facts, (Ct. Recs. 58 & 59). However, these documents were not  
12 filed until May 6, 2005, over thirty days following the filing of the  
13 motions; thus, Plaintiff's opposition was late. In addition, Plaintiff  
14 filed his LR 56.1 Statement of Facts Responding to City of Wenatchee and  
15 Paul Hughes' LR 56.1 Statement, (Ct. Rec. 72), on May 13, 2005. Mr.  
16 Hall, himself, filed a Motion to File Reply, (Ct. Rec. 64), on May 6,  
17 2005, asking the Court to allow him leave to file the untimely opposition  
18 papers. Given that Mr. Hall is represented by counsel, the Court strikes  
19 his Motion to File Reply, (Ct. Rec. 64), and advises Mr. Hall that while  
20 he is represented by counsel all of Plaintiff's filings must be filed by  
21 counsel.

22 Defendants ask the Court to strike Plaintiff's untimely opposition.  
23 (Ct. Recs. 55 & 60.) Because Plaintiff failed to comply with the

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25 <sup>1</sup> Previously, the Court advised Plaintiff's counsel about the  
26 consequences of failing to file a response to a motion in the Order  
Granting Chelan County's Motion for Summary Judgment, (Ct. Rec. 17).

1 deadlines set out in the Court's Scheduling Order and because the Court  
2 previously advised Plaintiff's counsel of the consequences of such a  
3 failure, the Court will not consider Plaintiffs' Affidavit of Ryan  
4 Edgley, (Ct. Rec. 57), Responses to Defendants' Statements of Material  
5 Facts, (Ct. Recs. 58 & 59), and Plaintiff's LR 56.1 Statement of Facts  
6 Responding to City of Wenatchee and Paul Hughes' LR 56.1 Statement, (Ct.  
7 Rec. 72). However, the Court still reviews the substance of the  
8 Defendants' motion in reaching its conclusions below.

9 **B. Factual Background<sup>2</sup>**

10 On July 12, 2001, Robbie Lee Hall was traveling from Othello,  
11 Washington to Wenatchee, Washington with Guy Madsen and Kimberly Purdy.  
12 Sometime during the day, Mr. Hall took three pills, believed to be  
13 Valium, a pain pill, and a nerve pill, from Ms. Purdy. Later, Mr. Hall  
14 and Ms. Purdy made their way to Central Washington Hospital to visit  
15 Grant Madsen, Sr. Upon leaving the hospital, Mr. Hall and Ms. Purdy  
16 decided to walk down to the Columbia River to go swimming; yet, they did  
17 not make it to the river, as apparently, Mr. Hall began feeling the  
18 effects of the three pills he took earlier in the day. Consequently, Mr.

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20 <sup>2</sup> As a result of Plaintiff's untimely opposition, this "Factual  
21 Background" is based on Defendants City of Wenatchee and Paul Hughes' LR  
22 56.1 Statement of Facts, (Ct. Rec. 36), and Defendants BNSF and Scott  
23 MacLeod's Specific Facts in Support of Their Motion for Summary  
24 Judgment," (Ct. Rec. 41), the declarations and exhibits filed in support  
25 of Defendants' motions, and then construing such facts in the light most  
26 favorable to Plaintiff.

1 Hall "passed out" in a grassy area on BNSF property adjacent to its  
2 active mainline tracks. During his deposition, Mr. Hall stated that he  
3 did not wake up or leave the location where he passed out until the next  
4 day.

5 On July 13, 2001, at approximately 8:00 a.m., an individual informed  
6 the Wenatchee Police Department (WPD) that a man was sitting in the  
7 middle of the BNSF's railroad tracks behind the Red Lion in Wenatchee.  
8 WPD officers were immediately assigned by radio to investigate the  
9 situation. BNSF Senior Special Agent Scott MacLeod ("Officer MacLeod"),  
10 a commissioned Washington State law enforcement officer, heard the radio  
11 transmission while on duty and responded to the situation as well.

12 Upon arriving at the scene, Officer MacLeod and WPD Officers Homer  
13 Ramirez and Shawndra Duke observed Mr. Hall walking south along a dirt  
14 road running parallel with the railroad tracks. After speaking with Mr.  
15 Hall, Officer MacLeod cited Mr. Hall for second degree trespassing. WPD  
16 Officer Hughes, who had also arrived, provided Mr. Hall with his Miranda  
17 warnings and searched Mr. Hall's bag. Officer Hughes transported Mr.  
18 Hall to the Chelan County Jail for booking.

19 Mr. Hall filed suit on February 7, 2003, (Ct. Rec. 1), alleging a  
20 violation of his civil rights under 42 U.S.C. § 1983 as a result of a  
21 wrongful seizure, arrest, search and prosecution. The Court previously  
22 dismissed Chelan County and Gary Riesen.

### 23 **C. Standard**

24 A party is entitled to summary judgment where the documentary  
25 evidence produced by the parties permits only one conclusion. *Anderson*  
26 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The party seeking

1 summary judgment must show that there is an absence of disputed issues  
2 of material fact and that he is entitled to judgment as a matter of law.  
3 FED. R. CIV. PROC. 56(c). In other words, the moving party has the burden  
4 of showing that no reasonable trier of fact could find other than for the  
5 moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "A  
6 material issue of fact is one that affects the outcome of the litigation  
7 and requires a trial to resolve the parties' differing versions of the  
8 truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).  
9 The court is to view the facts and draw inferences in the manner most  
10 favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Chaffin*  
11 *v. United States*, 176 F.3d 1208, 1213 (9th Cir. 1999).

12 A burden is also on the party opposing summary judgment to provide  
13 sufficient evidence supporting his claims to establish a genuine issue  
14 of material fact for trial. *Anderson*, 477 U.S. at 252; *Chaffin*, 186 F.3d  
15 at 1213. "[A] mere 'scintilla' of evidence will be insufficient to  
16 defeat a properly supported motion for summary judgment; instead, the  
17 non[-]moving party must introduce some 'significant probative evidence  
18 tending to support the complaint.'" *Fazio v. City & County of San*  
19 *Francisco*, 125 F.3d 1328, 1331 (9th Cir. 1997) (quoting *Anderson*, 477  
20 U.S. at 249, 252). However, the Court has decided not to consider  
21 Plaintiff's late opposition; therefore, the Court will view the evidence  
22 submitted by the Defendants in the light most favorable to Plaintiff.

#### 23 **D. Legal Analysis**

24 The Defendants argue the officers are entitled to qualified immunity  
25 protection because the arrest of Plaintiff was supported by probable  
26 cause and the officers acted reasonably and, therefore, the 42 U.S.C. §

1 1983 cause of action must be dismissed against the individual officers.  
2 Officer Hughes also argues, because he was not the arresting officer,  
3 Plaintiff cannot maintain a § 1983 cause of action against him for  
4 wrongful arrest or wrongful search. In addition, the City of Wenatchee  
5 contends the claims against it must be dismissed because there is no  
6 evidence of an illegal city policy or custom.

7 Section 1983 is a remedial statute which provides an avenue of  
8 redress to persons injured by the actions of government which violate  
9 federal constitutional rights. The statute states in pertinent part:

10 Every person who, under color of any statute, ordinance,  
11 regulation, custom, or usage, or any State or Territory or the  
12 District of Columbia, subjects, or causes to be subjected, any  
13 citizen of the United States or other person within the  
14 jurisdiction thereof to the deprivation of any rights,  
privileges, or immunities secured by the Constitution and  
laws, shall be liable to the party injured in an action at  
law, suit in equity, or other proper proceeding for redress.

15 42 U.S.C. § 1983. A plaintiff must demonstrate: (1) a person deprived  
16 the plaintiff of a federal constitutional or statutory right and (2) that  
17 person acted under color of state law. *Wood v. Ostrander*, 879 F.2d 583,  
587 (9th Cir. 1989).

18 Qualified immunity protects government officials performing  
19 discretionary functions "from liability for civil damages insofar as  
20 their conduct does not violate 'clearly established' statutory or  
21 constitutional rights of which a reasonable person would have known."  
22 *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The defense of qualified  
23 immunity has been extended to police officers. *Harris v. City of*  
24 *Roseburg*, 664 F.2d 1121, 1127 (9th Cir. 1981). A government official is  
25 entitled to qualified immunity if (1) the law governing the conduct was  
26 clearly established and (2) under that clearly established law, a

1 reasonable official would have believed his conduct to be lawful. *Conn*  
2 *v. Gabbert*, 526 U.S. 286, 290 (1999); *Thompson v. Souza*, 111 F.3d 694,  
3 698 (9th Cir. 1997); *Diruzza v. County of Tehama*, 206 F.3d 1304 (9th Cir.  
4 2000). A law is clearly established if "a reasonable official would  
5 understand that what he is doing violates that right." *Jensen v. City of*  
6 *Oxnard*, 145 F.3d 1078, 1085 (9th Cir. 1998). The Supreme Court has  
7 indicated that a certain degree of predictability is required:

8       The contours of the right must be sufficiently clear that a  
9       reasonable official would understand that what he is doing  
10      violates that right. This is not to say that an official  
11      action is protected by qualified immunity unless the very  
12      action in question has previously been held unlawful . . . but  
13      it is to say that in the light of pre-existing law the  
14      unlawfulness must be apparent.

15 *Anderson v. Creighton*, 483 U.S. 635, 640. (1987). "The qualified  
16 immunity standard 'gives ample room for mistaken judgments' by protecting  
17 'all but the plainly incompetent or those who knowingly violate the  
18 law.'" *Hunter v. Bryan*, 502 U.S. 224, 229 (1991); *Know v. S.W. Airlines*,  
19 124 F.3d 1103, 1007 (9th Cir. 1997). This law must be clearly  
20 established at the time of defendant's acts. *Conn v. Gabbert*, 526 U.S.  
21 286, 290 (1999); *Mendoza v. Block*, 27 F.3d 1357, 1361 (9th Cir. 1994).

### 22       **1. Officer Hughes**

23       Officer Hughes argues he did not arrest, imprison, or prosecute Mr.  
24 Hall and, therefore, he could not have maliciously prosecuted or  
25 imprisoned Mr. Hall. The Court finds, for purposes of the qualified  
26 immunity analysis, there is sufficient evidence establishing that both  
Officer Hughes and Officer McLeod arrested Mr. Hall.

      An arrest is the taking or seizing of a person either by touching  
or by an act which indicates an intention to take the individual into

1 custody and subject the person arrested to the actual control of the  
2 person making the arrest, or any deprivation of either liberty of  
3 movement or freedom to remain in the place of his lawful choice by one  
4 using physical force or conduct. *Kilcup v. McManus*, 64 Wash. 2d 771, 777  
5 (1964). The existence of an arrest depends upon a case-by-case objective  
6 evaluation of all of the surrounding circumstances, *Wash. v. Reichenbach*,  
7 153 Wash. 2d 126, 135 (2004), and the test is whether a reasonable  
8 detainee under the circumstances would consider himself under custodial  
9 arrest. *Wash. v. Radka*, 120 Wash. App. 43, 49 (2004).

10 Notwithstanding the confusion regarding which officer informed Mr.  
11 Hall that he was under arrest for criminal trespass in the second degree,  
12 the Court finds the conduct of Officer Hughes equates to an "arrest."  
13 The Court agrees merely transporting a suspect may be insufficient to  
14 constitute an arrest; however, the Court finds Officer Hughes additional  
15 conduct of reading Mr. Hall his Miranda rights, handcuffing him, and  
16 then co-signing the incident report, constitutes a "taking or seizing of  
17 a person either by touching or by an act which indicates an intention to  
18 take the individual into custody and subject the person arrested to the  
19 actual control of the person making the arrest, or any deprivation of  
20 either liberty of movement or freedom to remain in the place of his  
21 lawful choice by one using physical force or conduct." See *Kilcup v.*  
22 *McManus*, 64 Wash. 2d at 777 (1964). Accordingly, the Court considers Mr.  
23 Hughes to be an arresting officer and denies in part his motion.

## 24 **2. Clearly Established**

25 Plaintiff alleges the officers' conduct resulted in an unlawful  
26 search and seizure, unlawful arrest, incarceration, and prosecution. The



1 first question to be asked in connection with a qualified immunity  
2 analysis is whether "the law governing the conduct was clearly  
3 established." The Court finds Washington law on July 13, 2001, clearly  
4 established that an officer may arrest a person without a warrant for  
5 committing a misdemeanor only when the offense is committed in the  
6 presence of the officer," R.C.W. § 10.31.100, and an officer must have  
7 probable cause to believe that an offense has been committed in order to  
8 perform a lawful arrest. *Wash. v. Gluck*, 83 Wash. 2d 424, 426-27 (1974).  
9 Probable cause arises when police have knowledge based on reasonably  
10 trustworthy information that a person arrested has committed a criminal  
11 offense. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Furthermore, the Court  
12 finds the law clearly established that an officer cannot maliciously  
13 prosecute an individual. *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066  
14 (9th Cir. 2004). Lastly, the Court finds the law clearly established  
15 that an officer needs probable cause to search a belonging of an  
16 individual, absent a search incident to arrest or an inventory search.  
17 *Williams v. United States*, 263 F.2d 487 (1959).

### 18 **3. Reasonable Officer**

19 Accordingly, the next question is whether a reasonable officer on  
20 July 13, 2001, would believe that grounds existed to arrest Mr. Hall for  
21 criminal trespass in the second degree. "A person is guilty of criminal  
22 trespass in the second degree if he knowingly enters or remains  
23 unlawfully in or upon premises of another under circumstances not  
24 constituting criminal trespass in the first degree." R.C.W. §  
25 9A.52.080(1). The officers had the burden of proving that Mr. Hall  
26

1 committed such a crime. *See Wash. v. R.H. DOB 2/3/79*, 86 Wash. App. 807,  
2 810 (1997).

3 Section 9A.52.010(3) provides, "[a] person 'enters or remains  
4 unlawfully' in or upon premises when he is not then licensed, invited,  
5 or otherwise privileged to so enter or remain." This subsection further  
6 states:

7 A person who enters or remains upon unimproved and apparently  
8 unused land, which is neither fenced nor otherwise enclosed in  
9 a manner designed to exclude intruders, does so with license  
10 and privilege unless notice against trespass is personally  
11 communicated to him by the owner of the land or some other  
12 authorized person, or unless notice is given by posting in a  
13 conspicuous manner. . . . A license or privilege to enter or  
remain on improved and apparently used land that is open to  
the public at particular times, which is neither fenced nor  
otherwise enclosed in a manner to exclude intruders, is not a  
license or privilege to enter or remain on the land at other  
times if notice of prohibited times of entry is posted in a  
conspicuous manner.

14 R.C.W. § 9A.52.010(3).

15 First, the Court notes Officers MacLeod and Hughes knew that both  
16 the railroad track and the dirt road were owned by BNSF; accordingly, the  
17 officers could reasonably suspect that Mr. Hall was trespassing when he  
18 was seen walking on the dirt road. *See Wash. v. Blair*, 65 Wash. App. 64,  
19 70. Yet, after reviewing the record and photograph submitted, the Court  
20 finds a reasonable officer would question whether Mr. Hall understood  
21 that he was not licensed to be on the dirt road. The dirt road is  
22 bordered by railroad tracks on one side; however, the other side of the  
23 road is bordered by homes and businesses, some of which, but not all,  
24 have fences between their property and the road. The officers admitted  
25 there are no signs and/or gates on this dirt road notifying Mr. Hall that  
26 this road was owned by BNSF, and not the city. Accordingly, the Court

1 finds a reasonable officer would believe that Mr. Hall did not commit  
2 criminal trespass in the second degree by simply walking on the dirt  
3 road.

4 According to Officer MacLeod he asked Mr. Hall what he was doing,  
5 and Mr. Hall said "he was sitting on the railroad tracks smoking a  
6 cigarette." (Ct. Rec. 57, p. 37). However, Mr. Hall disputes that he  
7 ever told Officer McLeod this. (Hall Dep., Ct. Rec. 45, p. 3.) Even  
8 though the Court is not considering the Plaintiff's untimely submissions,  
9 the Court views the evidence in the light most favorable to Plaintiff,  
10 the non-moving party. Accordingly, for purposes of this motion, the  
11 Court finds Plaintiff did not inform Officer McLeod that he had been  
12 sitting on the tracks smoking a cigarette.

13 However, the officers were aware the WPD received a telephone call  
14 from an individual who observed a man sitting or laying on BNSF's tracks.  
15 The reliability of this tip was supported when the officers came across  
16 Mr. Hall in this general area and appeared to be under the influence of  
17 intoxicants, and admitted to have taking three pills. The Court takes  
18 judicial notice of the fact that a reasonable individual would understand  
19 that railroad tracks are property of another and not open for public use.  
20 In addition, Mr. Hall informed the officers that he had slept on a grassy  
21 hill, also on the BNSF right-of-way, the previous evening. Accordingly,  
22 based on the totality of the circumstances, the Court finds a reasonable  
23 officer would have believed Mr. Hall had earlier that morning been  
24 sitting/laying on the railroad tracks, knowingly committing trespass;  
25 and, under the circumstances, a reasonable officer would have believed  
26 probable cause existed to arrest Mr. Hall for criminal trespass in the

1 second degree as the officers. Thus, the officers are entitled to  
2 qualified immunity in connection with the arrest.

3 Relatedly, a reasonable officer would have understood that Mr. Hall  
4 could be searched incident to arrest and prosecuted for this crime.  
5 Accordingly, the Officers are entitled to qualified immunity in  
6 connection with the search of Mr. Hall's person and belongings and the  
7 prosecution of such crimes. Defendants' motions are granted in part.

#### 8 **4. City of Wenatchee**

9 The City of Wenatchee submits it is not liable under § 1983 because  
10 it cannot be found liable on a respondeat superior theory, *Monell v. New*  
11 *York City Department of Soc. Servs.*, 426 U.S. 658, 691 (1978), and there  
12 is no evidence of a policy or custom of the City of Wenatchee violating  
13 Mr. Hall's constitutional rights or others in a similar fashion, see  
14 *Gillette v. Delmore*, 1979 F.2d 1342, 1346-67 (9th Cir. 1992). The Court  
15 finds there is no evidence supporting a finding (a) that the City of  
16 Wenatchee has an express policy that would cause a constitutional  
17 deprivation if enforced, (b) the City of Wenatchee has a practice that  
18 is so widespread and well settled as to constitute a custom or usage with  
19 the force of law even though it is not authorized by written law or  
20 express policy, or (c) an allegation that a person with final policy-  
21 making authority for the City of Wenatchee caused the constitutional  
22 injury. See *Lawrence v. Kenosha County*, 391 F.3d 837, 844 (7th Cir.  
23 2004). Accordingly, the Court grants in part the City's motion.

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**E. Plaintiff's Motion to Exclude Testimony of Expert Witness**

Because the Court grants the Defendants' motions, thereby eliminating Plaintiff's claims, the Court denies as moot Plaintiff's motion.

For the above reasons, **IT IS HEREBY ORDERED:**

1. Mr. Hall's Motion to File Reply, (Ct. Rec. 64), is **STRICKEN**,  
and

2. Defendants City of Wenatchee and Officer Paul Hughes' Motion for Summary Judgment, (Ct. Rec. 34), is **DENIED IN PART (arresting officer) and GRANTED IN PART (qualified immunity)**

2. Defendants BNSF Railway Company and Scott MacLeod's Motion for Summary Judgment, (Ct. Rec. 37), is **GRANTED**.

3. Judgment is to be entered in the Defendants favor with prejudice.

4. Plaintiff's Motion to Exclude Testimony of Expert Witness, (Ct. Rec. 46), is **DENIED AS MOOT**.

**IT IS SO ORDERED.** The District Court Executive is directed to:

1. Enter this Order

2. Enter Judgment in Defendants favor with prejudice

3. Provide copies of this Order and the Judgment to counsel, and

4. Close this File.

**DATED** this 16th day of May, 2005.

s/ Edward F. Shea

EDWARD F. SHEA

United States District Judge